IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

JUDGMENT

MEWA RAM VS.. STATE OF RAJASTHAN & ANR.

(D.B.C.Writ Petition No.879/03)

Date of Judgment :- 11th August,2006.

PRESENT

REPORTABLE

HON'BLE THE CHIEF JUSTICE SHRI S.N.JHA
HON'BLE JUSTICE SHRI MOHAMMAD RAFIQ

Mr.Anand Purohit,for the petitioner.
Mr.S.K.Vyas, Government Advocate for the State.
Mr.Narpat Singh, for respondent no.2.

BY THE COURT:(PER HON'BLE MR.MOHAMMAD RAFIQ),J.

The petitioner in this writ petition has challenged validity of Section 173-A of the Rajasthan Municipalities Act, 1959(for short "the Act of 1959) and has prayed that the same be declared ultra vires of Articles 19(6) and 300-A of the Constitution of India and Sections 8 and 55(6)(a) of the Transfer of Property Act,1882(for short "the Act of 1882") and has also prayed for quashment of letter dated 24th September,2002 (Annexure 6) and consequently refund of the amount deposited by the petitioner pursuant thereto with interest @ 24% p.a.

The case of the petitioner as set up in the memorandum of writ petition is that the petitioner alongwith his brother Suraj Mal

purchased a house situated in Mohalla Hindusingh Kotdi, Sardarpura, Barmer for consideration of Rs.3,00,000/- vide sale deed dated 8.10.1997 from one Shri Bhabhoot Singh s/o Shri Rai Singh and others. Having purchased the said house, the petitioner also took possession of the same. The petitioner thereafter submitted an application to the Municipal Board, Barmer(for short “the Board”) for conversion of land use of the land over which this house was constructed from residential to commercial. The Board granted desired permission on 16.1.2002 and accordingly the petitioner started raising construction on the land. When the entire construction was over, the respondent Board gave a notice to the petitioner to deposit the conversion charges. Accordingly, the petitioner deposited such charges under protest in the sum of Rs.35,580/- on 27th June, 2002. The petitioner has submitted that no prohibition or restraint could be placed on his right to use the free hold land as per conditions of the `patta' which is age old and was given by the then Jagirdars of Hameerpura.

In para 6 of the writ petition, reference to Section 173-A as it earlier existed in the Act of 1959 has been made, which for the facility of reference is reproduced hereunder:-

> “173-A. Power of the State Government to allow change in the use of land.-Notwithstanding anything contained in this Act, where any land has been allotted or sold to any person by a municipality or the State Government subject to the condition of restraining the use for a particular purpose, the State Government may, if it is satisfied so to do in a public interest, allow the owner or holder of such land to use it purpose for which it was originally allotted or sold,

on payment of such conversion charges as may be prescribed:-

Provided that the rates of conversion charges may be different for different areas and for different purposes.

(2) The conversion charges so realised shall be credited to the Consolidated Fund of the State or to the fund of the municipality as may be determined by the State Government.

(3) Such charges shall be the first charge on the interest of the person liable in the land the use of which has been changed and shall be recoverable as arrears of land revenue."

It has been submitted that the aforesaid Section 173-A was declared unconstitutional and struck down by this Court in D.B.C.Writ Petition No.746/99 and consequently the legislature has substituted the aforesaid section with another Section 173-A promulgated vide notification dated 30th September,1989 which is impugned in the present proceedings. The newly inserted Section 173-A of the Act of 1959 is also for the facility of reference is reproduced hereunder:-

"173-A. Restriction on change of use of land and power of the State Government to allow change of use of land.-(1) No person shall use or permit the use of any land situated in any municipal area, for the purpose other than that for which such land was originally allotted or sold to any person by the State Government, any municipality, any other local authority or any other body or authority in accordance with any law for the time being in force, or otherwise than as specified under a Master Plan, wherever it is in operation.

(2) In the case of any land not allotted or sold as aforesaid and not covered under sub-section(1), no person shall use or permit the use of any such land situated in a municipal area for the purpose other than that for which such land use was or its permissible in accordance with the Master Plan, wherever it is in operation, or under any law for the

time being in force.

(3) Notwithstanding anything contained in sub-section(1) or sub-section(2), the State Government or any authority authorised by it by notification in the Official Gazette, may allow the owner or holder of any such land to have change of use thereof, if it is satisfied so to do in public interest, on payment of conversion charges at such rates and in such manner as may be prescribed with respect to the following changes in use:-

(i) from residential to commercial or any other purpose; or
(ii) from commercial to any other purpose; or
(iii) from industrial to commercial or any other purpose;
(iv) from cinema to commercial or any other purpose;

Provided that rates of conversion charges may be different for different areas and for different purpose.

(4) .....
(5) .....
(6) .....
(7) .....

It has been submitted that this Court while striking down the old Section 173-A held that such provision has to be read with the provisions of Section 8 and 55(6)(a) of the Act of 1882. It was held that where a person has purchased the land from a private citizen who is the owner of land , all the rights of the former owner would stand transferred to the purchaser. According to provisions of Section 8 read with Section 55(6)(a) of the Act of 1882 all rights attached to such land which the original owner possessed would be transferred to the purchaser. It was held that unless the rights in the immovable property are acquired by the State Government or by the Municipality, the purchaser cannot be deprived of such rights.

It has been submitted that the arguments advanced on behalf of the respondents that all lands situated within the municipal limits irrespective of the fact whether the land was sold or allotted by the State Government or the Municipality or it was transferred by sale or gift by a private citizen or was inherited in accordance with the law of succession would be treated as government land, was rejected by the Court. It was held that old Section 173-A of the Act of 1959 cannot be interpreted in such a manner as to deprive the owners of immovable properties situated within municipal area, of the rights which are available to them u/s 8 and 55(6)(a) of the Act of 1882. Such right would be available to them even if the land had been sold by the Municipality or the State Government unconditionally without putting any restraint on their rights to use the land for specified purpose only. There would be no question of demanding any conversion charges from such purchasers if at a later stage they wanted to change the use of land. It has been submitted that a bare perusal of `patta' (Annexure 5) would go to show that transfer of the land in question was without any condition and therefore at a subsequent stage by amendment in law the State Government or the Board cannot encroach upon the rights of the citizens to hold property as enshrined under Article 300-A of the Constitution of India. The respondents by inserting new Section 173-A in the Act of 1959 wants to trample the rights of the persons in the immovable property and place unreasonable restriction on their freedom to exercise such a right conferred on them by Article 19(1)(g) of the Constitution of India which would not be saved under Article 19(6) of the Constitution.

The petitioner has submitted that when he purchased the property in question, he had carefully examined the terms and conditions of the `patta'. He thereupon understood the nature of land and found that there was no prohibition or restriction imposed in regard to the change of the land use. Now the newly inserted Section 173-A impinges upon his rights of using this property in the manner he wants and his rights guaranteed under Sections 8 and 55(6)(a) of the Act of 1882 are sought to be taken away. Further more, the petitioner has submitted that levy of conversion charges for change of the land use can at best be called as a fee attracting the principles of quid pro quo. This would immediately give rise to the question as to what services the respondents are offering in lieu of conversion charges. There is not an iota of evidence to show that the respondents are offering any services or discharging any duties in the process of sale/purchase or change of use of the land. In absence of quid pro quo, levy of conversion charge is bad in law and is liable to be struck down.

Lastly it has been submitted that when an earlier similar provision of law has been struck down by this Court, another provision on the same lines inserted by way of amendment besides being against the spirit of the Constitution is also in direct conflict with Articles 19(6) and 300-A of the Constitution of India as also against the law enunciated by this Court in its earlier judgments. Hence, this writ petition.

The petition has been contested by the respondents who have filed reply thereto. In the reply, it has been contended that the

demand notice dated 24.9.2002 has been issued to the petitioner strictly in accordance with the provisons of the Act of 1959 and the same has been issued as per the law in force and is in consonance with the Land Use Plan of Barmer . It has been submitted that Section 173-A as amended vide notification dated 30th September,1999 is a valid piece of legislation. It in no way comes in conflict with Articles 19(6) and 300-A of the Constitution of India nor does it in any manner violate provisions of Sections 8 and 55(6)(a) of the Act of 1882. It has also been submitted that the petitioner has got alternative remedy of appeal against the demand notice dated 24.9.2002. The present petition is therefore liable to be dismissed on account of availability of alternative remedy.

We have heard Mr.Anand Purohit, learned counsel appearing for the petitioner, Mr.S.K.Vyas, learned Government Advocate appearing for the State and Mr.Narpat Singh, learned counsel for the respondent no. 2 and perused the record.

Mr.Anand Purohit, learned counsel for the petitioner in support of his arguments has relied upon two Division Bench judgments of this Court in Pareshar Soni vs. State of Rajasthan, reported in 2005(3) W.L.C.(Raj.) p.468 and Municipal Corporation,Jodhpur vs. Rajendra Bhandari , reported in AIR 2001 Rajasthan 9.

On the other hand, learned counsel for the respondent submitted that now with the new Section 173-A having been placed in the Statute Book, there is no impediment in law for levying conversion

charges for the change of land use and cases cited by the counsel for the petitioner pertain to old Section 173-A of the Act of 1959 and are therefore not relevant for deciding the present case.

We have bestowed our earnest consideration to the arguments advanced at the bar and perused the record.

According to old Section 173-A levy of conversion charge was dependent on fulfillment of two conditions namely ,(1) that the land must have been allotted or sold to any person by the Municipality or the State Government and (2) that the allotment or sale of land by the Municipality or the State Government must be subject to condition of restraining its use for a particular purpose. If any of these conditions were not fulfilled, the conversion charges could not be levied. Two Division Bench judgments cited supra in which reference to other similar judgments rendered by Single and Division Benches has been made have all been decided on the basis of such interpretation of old Section 173-A. Ratio of these judgments cannot be applied to the facts of the present case particularly when the law empowering the State or the Municipalities to levy conversion charges itself has completely been changed. Now with the insertion of new Section 173-A in the Act of 1959, the issue shall have to be examined afresh in the light of this new provision.

Now we shall examine the new Section 173-A of the Act of 1959 which provides for restriction on change of use of land and power of the State Government to allow change of use of land . Sub-section(1) of

the new Section 173-A can be for the purpose of interpretation divided into two parts providing as under:-

> -that no person shall use or permit the use of any land situated in any municipal area for the purpose other than that for which such land was originally allotted or sold to any person by the State Government, any municipality, any other local authority or any other body or authority in accordance with any law for the time being in force;
>
> -that no person shall use or permit the use of any such land situated in a municipal area for the purpose other than that for which such land use was or is permissible in accordance with the Master Plan, wherever it is in operation, or under any law for the time being in force.

Sub-section(1) of Section 173-A having thus been split in two parts, it would be evident that apart from retaining a provision similar to the one which was available in the old Section 173-A, sub-section(1) of the new section also provides for restriction on the right to use the land situated in any municipal area otherwise then as specified under a Master Plan, wherever it is in operation. Sub-section(2) of this Section has further amplified the scope of this provision by providing that in the case of any land not allotted or sold as aforesaid and not covered under sub-section (1), no person shall use or permit the use of any such land situated in a municipal area for the purpose other than that for which such land use

was permissible in accordance with the Master Plan, wherever it is in operation, or **under any law for the time being in force**. It would thus be clear that according to sub-section(2) even those areas where Master Plan is not in operation, conversion charges can be levied under the authority of such newly added provision if it is permissible "under any law for the time being in force". Sub-section (3) of new Section 173-A has even gone a step further by providing that notwithstanding anything contained in sub-section(1) or sub-section(2), the State Government or any authority authorised by it by notification in the Official Gazette, may allow the owner or holder of any such land to have change of use thereof, if it is satisfied that so to do would be in public interest, on payment of conversion charges at such rates and in such manner as may be prescribed with respect to the changes in use i.e. :- (i) from residential to commercial or any other purpose; or (ii) from commercial to any other purpose; or (iii) from industrial to commercial or any other purpose; or (iv) from cinema to commercial or any other purpose; provided that rates of conversion charges may be different for different areas for different purpose. Sub-section (3) which starts with non obstante clause has thus been given over riding effect over the provisions of sub-section(1) and (2) and can be independently pressed into service by means of issue of notification for levy of conversion charges if the State Government is satisfied that doing so would be in public interest.

It is trite law that a statute carries with it the presumption of its constitutional validity. Even though the petitioner has not questioned legislative competence of the State Legislature in enacting newly inserted

Section 173-A of the Act of 1959. We have however examined this question because of several judgments delivered by this Court in past on the subject albeit in the context of old Section 173-A. Having tested the impugned provision on the anvil of legislative competence, we are satisfied that the State Legislature has been invested with competence to enact the law like the one which is under examination in these proceedings with reference to its power referable to Entry V of List II of Seventh Schedule read with Article 246 of the Constitution of India and we shall presently state the reasons for our such satisfaction.

The State Legislature while enacting a law with reference to its demarcated area of legislative power can also legislate on subsidiary and ancillary matters. Entry V of List II of Seventh Schedule pertains to a local government that is to say, the constitution and powers of municipal corporations, improvement, trusts, district boards, mining settlement authorities and other local authorities, for the purpose of local self-government or village administration. We see no illegality in the State Legislature having provided for levy of conversion charges either by itself or by conferring such power under a notification in the Official Gazette on any other local authority or any other body or authority established under any law for the time being in force. In fact, such a legislation is in consonance with Article 243-W of the Constitution of India which provides that subject to the provisions of this Constitution, the Legislature of a State may by law, endow:-

(a) the Municipalities with such powers and authority as may

be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to- (i) xxxx xxxx (ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule ;

(b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule.

The Twelfth Schedule of the Constitution in Entry II provides for regulation of land use and construction of buildings. Apart from this, Article 243-X of the Constitution itself provides that the Legislature of a State may, by law, authorise a Municipality to levy, collect and appropriate such taxes, duties, tolls and fees in accordance with such procedure and subject to such limits as may be specified in law. These provisions are in fact intended to empower the local authorities to help them become independent and self-sufficient and function as vibrant democratic institutions. We therefore hold that the State Legislature had the competence to enact the impugned Section 173-A.

This now takes us to the question that if no such restriction for change of the land use was placed on the rights of the original

buyer/owner when the land was originally sold or allotted to him by the State Government or any local authority whether such a restriction can be subsequently imposed by any local law in spite of the “protection” available to the buyer of the property u/s 8 and 55(6)(a) of the Act of 1882. Section 8 of the Act of 1882 inter alia provides that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. Section 55(6)(a) of the Act of 1882 provides that the buyer is entitled- where the ownership of the property has passed to him, to the benefit of any improvement in , or increase in value of, the property, and to the rents and profits thereof. The Act of 1882 governs the conditions of transfer and the matters related therewith and ancillary thereto, inter-se between the transferee and the transferor and in certain context, qua the strangers also. This however does not and cannot affect the powers of a Legislature of the State to regulate by law the use of the landed property, which is subject matter of transfer. Such provisions cannot bind the State or a local authority acting under the authority of any law for the time being in force, to levy and realise the charges for conversion of land use. The making of law like the one presently we are dealing with and conferment of authority for charging any kind of levy related to the landed property on local body cannot be made subservient to the provisions contained in the Transfer of Property Act, 1882. The Act of 1882 and the Act of 1959 operate within their independent spheres and do not in any manner come in conflict with one another. We find no merit in the argument that unless the rights in the immovable property are

acquired by State or the local authority, the conversion charges for change of its land use cannot be levied. Levy and realisation of conversion charges for change of land use in our view falls within the purview of reasonable restriction as envisaged by Article 19(6) of the Constitution of India and therefore also do not in any manner offend the provisions contained in Article 300-A thereof.

We therefore hold the newly inserted provision of Section 173-A of the Act of 1959 intra-vires of the Constitution of India as also the Act of 1882. Challenge to the constitutional validity thereof thus having failed, the present writ petition deserves to be dismissed. In the result, the writ petition is dismissed with no order as to costs.

(MOHAMMAD RAFIQ),J. **(S.N.JHA),C.J.**

Aditya/-